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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

GUADALUPE MARTINEZ
HERNANDEZ,

Defendant and Appellant.

G056051

(Super. Ct. No. 17NF2401)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Gregg L. Prickett, Judge. Reversed.

Sylvia W. Beckham, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Senior Assistant Attorney General, Charles C. Ragland, Alana Butler, and Scott C. Taylor, Deputy Attorneys General, for Plaintiff and Respondent.

A jury determined Guadalupe Martinez Hernandez was guilty of assault by means likely to produce great bodily injury and found true a gang allegation. He received a six-year prison sentence. Hernandez asserts the trial court abused its discretion when it precluded him from cross-examining the victim about whether his motivation for testifying was to obtain a special “U-Visa” available to certain crime victims.¹ Hernandez maintains he and the victim gave very different accounts of what transpired, and there were no other witnesses, making credibility a crucial issue at trial. We conclude the court’s ruling limiting Hernandez’s cross-examination of the victim was prejudicial error requiring reversal of the judgment.

FACTS

In August 2017, Hernandez, a La Fabrica gang member, walked towards Sergio R.’s (Sergio) vehicle, which was stopped at an intersection in gang territory. After the two men argued, Hernandez assaulted Sergio through his car window, hitting his face with a beer can and kicking the car.

An information charged Hernandez with assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1), count 1),² assault by means of force likely to result in great bodily injury (§ 245, subd. (a)(4), count 2); and vandalism committed for gang purposes (§ 594, subds. (a), (d), count 3). As to counts 1 and 2, the information alleged Hernandez committed the assault at the direction of, in association with, or for the benefit of a criminal street gang (La Fabrica). (§ 186.22, subd. (b)(1).)

¹

See 8 Code of Federal Regulations part § 214.14 (describing U-Visa program, which generally permits victims of certain crimes who cooperate with law enforcement to remain temporarily in United States despite immigration status).

²

All further statutory references are to the Penal Code, unless otherwise indicated.

I. Pretrial Evidentiary Ruling

Before trial the prosecutor informed defense counsel that Sergio asked the police about obtaining a U-Visa. During a pretrial hearing, the prosecutor stated she would like clarification about whether defense counsel planned to ask Sergio about the U-Visa. Defense counsel confirmed she intended to cross-examine Sergio about this issue because the information was probative and relevant to his “motivation for testifying the way he’s testifying.” The court replied questions would be “extremely problematic” and this was currently an issue before the Legislature.

Defense counsel indicated she understood the court’s concerns and she asked if it would be possible to hold an Evidence Code section 402 hearing. The court expressed concern that questions about the U-Visa would generate inappropriate speculation about Sergio’s immigration status and there was a high potential for undue prejudice. It concluded the jury would need an explanation of what Sergio was allowed to do under the immigration laws. The court believed the inquiry would open a “‘Pandora’s box’” of information about the U-Visa application’s rules and procedures.

Defense counsel stated Sergio offered different stories about the incident. She learned that when the prosecutor asked Sergio to confirm his story, he pulled out the visa application and asked whether he could apply for it. Defense counsel asserted this conduct indicated Sergio “may not be testifying truthfully as to what occurred” and he was testifying in a way to benefit his immigration status. She acknowledged that if her questioning was not properly approached, “it would be treacherous,” but she wanted to work with the court to place parameters on how to question Sergio on this very probative topic.

The court decided the best approach would be to have Sergio subject to recall after he testified, giving the trial court time to consider his testimony before permitting cross-examination about the U-Visa. It did not specifically rule on defense counsel’s request for an Evidence Code section 402 hearing.

II. *Trial*

The jury heard very different stories about the incident from Hernandez and Sergio. Because Sergio offered inconsistent accounts, we will begin by discussing the information he gave to police officers immediately after the altercation.

Police officers Scott Edwards and Richard Browning testified they responded to Sergio's reported assault in the area of Julianna Park and Patt Street. Browning testified that when he and his partner (officer Jozette Murillo) arrived, he did not see Sergio or the suspect. Browning decided to search the area, driving southbound to La Palma, and then driving northbound towards Kemp Street. Browning testified they saw Hernandez on Kemp Street but they did not stop to question Hernandez because he was wearing different clothing than what Sergio had initially described when he called the police. It was not until after they found and spoke with Sergio that they realized Hernandez was a suspect.

The police located Sergio near a market on Patt Street. Edwards recalled he was wearing a white tank top and blue jeans. Edwards saw the front of his shirt was wet and blood stained. Sergio had a small laceration on his chin.

Edwards spoke with Sergio and observed, "he had been drinking." He clarified that based on his experience with, and in arresting, intoxicated people, he saw Sergio exhibited several symptoms associated with drinking alcohol. Specifically, Edwards could smell alcohol emanating from Sergio's person, Sergio's eyes were bloodshot, and he was acting "a little bit agitated." Edwards testified he did not perform a field sobriety test or arrest Sergio for driving under the influence. Edwards conceded these symptoms could also be attributed to a person crying after being hit in the face. The smell may have come from alcohol spilled during the attack. Edwards questioned Sergio, who pointed to different parts of the neighborhood where the police could likely locate Hernandez.

Murillo testified she spoke with Sergio, who said he was assaulted with a beer bottle. Murillo stated her partner looked for a beer bottle and could not find one. Murillo recalled Sergio later said it could have been a beer can. Sergio said he was not sure because things happened so fast. He did not mention Hernandez also used his fists during the assault. He also did not disclose there was a verbal argument before the alleged assault.

Browning searched Sergio's entire vehicle. He did not find a beer bottle or can inside it. He checked under the passenger's and driver's seats. He did not see or feel any liquid on the front windshield, console, dashboard, or seat area.

At trial, Sergio testified he was driving to the store the day of the incident because his wife had recently been released from the hospital. Sergio had lived in the neighborhood for eight years, and he had known Hernandez for the past six or seven years. He initially saw Hernandez standing on the sidewalk. As he approached a stop sign, Sergio claimed Hernandez emerged from between two parked cars on the side of the street. After Sergio heard Hernandez say "fuck you puto," he pulled over. Sergio asked Hernandez, "Who was he [sic]?" Sergio asserted he lived in the area and had family there, but Hernandez "was a no one" and no longer lived there. Sergio recalled he asked Hernandez, "Why was he doing that to me?" Sergio testified that when he stopped his car and asked Hernandez all these questions, Hernandez's response was to strike Sergio's face with a full can of beer. He claimed the can exploded and alcohol soaked Sergio and the interior of his car.

Sergio recalled Hernandez was standing on the passenger side of the vehicle when he struck Sergio, who was sitting in the driver's seat. Sergio stated Hernandez hit his right eye with the beer can "and then since he's [a] lefty, he hit me with his left hand." Sergio could not recall the number of times Hernandez struck him with his fists, but he remembered bleeding on the inside of his lip and on his face. Sergio

claimed his ability to deflect the blows was limited by the seatbelt. Hernandez said the neighborhood was his “barrio” and kicked the rear passenger door.

Sergio testified he repaired the damage to his vehicle by paying his friend \$700 cash. He did not have a receipt. Sergio stated he drove away but then called the police and returned 15 minutes later. Sergio claimed he did not clean the inside of the car, and it was still drenched in beer.

Sergio did not tell the officers that Hernandez cursed at him saying, “fuck you, puto” or “fuck you, bitch.” He was unsure if he was hit by a bottle or can, but he found a beer can in his vehicle the following day on the passenger side floorboard.

Sergio stated his injuries included a cut lip and blurred vision. His eyebrow was cut and his nose was swollen and painful for several days. Sergio stated he was afraid of retaliation.

III. Renewed Request for Cross-Examination of Sergio

After Sergio testified, defense counsel renewed her request to question him about his desire to obtain a U-Visa. She noted the officers testified Sergio may have been drinking the day of the incident. Sergio’s cross-examination revealed several inconsistent statements, as well as statements that were not supported by the officer’s testimony. She argued credibility issues with Sergio’s testimony and other issues suggesting he came to court “with an ulterior motive.”

The court ruled as follows: “The court is exercising its discretion under [Evidence Code section] 352, believes that there is more appropriate impeachment before the jury already regarding alcohol consumption, regarding prior inconsistent statements, and possible financial motive, based on having your friend repair the car. The court notes all of those are properly before the jury. [¶] The court has, as I’ve expressed, grave concerns about the impact of admitting that form of testimony for undue consumption of time of whether or not what the victim’s otherwise immigration status would be, what he would be eligible to apply for without a U-Visa, what the U-Visa program is, how one

qualifies, whether or not if you were a victim of a [section] 240 or [section] 242, you would still qualify for that. Whether or not you were . . . a victim of count 3 alone. Whether or not you would still qualify for it or not. [¶] The court believes that it would be an undue consumption of time with only minimal probative value as to bias or motive. For those grounds, the court denies the request to go into that area.”

IV. Defense Case

Hernandez told a very different story from Sergio at trial. He introduced himself, stating he was employed by a landscaping company. He had two young sons, ages seven and nine years old. He acknowledged that in 2010 and 2011 he was a member of La Fabrica, but claimed he stopped participating by the time of the incident in August 2017, because he became a “family man” and his priorities were his fiancée and children. Hernandez remembered meeting Sergio seven years earlier, and they socialized often. He stated Sergio was like “an uncle figure” and he had been to Sergio’s home over a hundred times.

On the day of the incident, Hernandez was walking away from the liquor store when he saw Sergio driving past. When they made eye contact, Hernandez stated Sergio “had a nasty look.” Hernandez waited for Sergio to drive past and walked towards the nearby stop sign. His son’s classmates were playing in a nearby park and lost control of their ball. A child asked Hernandez to throw the ball back. He helped the children and then continued walking.

As Hernandez headed back to the liquor store, he looked both ways before crossing the street. He saw Sergio’s car two houses away and then watched Sergio drive quickly in reverse in his direction. Hernandez feared for his life because of the speed and angle of Sergio’s car. He moved towards the store and out of the way of the car. Sergio stopped his car next to Hernandez, who cautioned Sergio to be more careful driving because there were children playing nearby. Hernandez said he was standing next to the driver’s side window. He denied cursing or stating any gang affiliation or territory.

Hernandez continued to admonish Sergio about his poor driving, and that Sergio had almost run him over. Sergio began yelling. At the end of the conversation, Sergio hit Hernandez's right arm with a piece of metal re-bar. Hernandez tried to take the metal bar by reaching into the vehicle. In the process, he scratched his left arm.

Hernandez claimed that when he spoke to the police he did not show them the scratches. He did not tell the officers about Sergio's misconduct, but rather claimed several people attacked him. He admitted to lying about what really happened when he spoke with the officers.

V. The Verdict & Sentence

The jury found Hernandez not guilty of counts 1 and 3, but guilty of count 2, and found true the gang allegation. The trial court sentenced Hernandez to a total prison term of six years (three years on count 2 and a consecutive three-year term on the gang enhancement).

DISCUSSION

I. The Victim's Immigration Status

Hernandez maintains the trial court abused its discretion and violated his constitutional rights when it refused to let him question Sergio about his interest in obtaining a U-Visa. A U-Visa is a type of "temporary nonimmigrant visa created by Congress to provide legal status for noncitizens who assist in the investigation of serious crimes in which they have been victimized. [Citations.]" (*People v. Morales* (2018) 25 Cal.App.5th 502, 506.) Hernandez contends questions about this topic would have shown Sergio, due to his immigration status, had a biased incentive to testify in a manner that would make himself eligible for the visa. Because Hernandez and Sergio told conflicting stories about the nature of the assault, and there were no other witnesses to the incident, the outcome of the trial depended entirely on the jury's assessment of his and Sergio's credibility.

“A criminal defendant has a constitutionally guaranteed right to confront and cross-examine the witnesses against him or her. [Citations.]” (*People v. Carter* (2005) 36 Cal.4th 1114, 1172 (*Carter*).) ““As a general matter, a defendant is entitled to explore whether a witness has been offered any inducements or expects any benefits for his or her testimony, as such evidence is suggestive of bias. [Citations.]” (*People v. Pearson* (2013) 56 Cal.4th 393, 455 (*Pearson*); Evid. Code, § 780, subd. (f) [“the court or jury may consider in determining the credibility of a witness any matter that has any tendency in reason to prove or disprove the truthfulness of his testimony at the hearing”].)

“The right of confrontation is not absolute, however, and may ‘in appropriate cases’ bow to other legitimate interests in the criminal trial process. [Citations.]” (*Carter, supra*, 36 Cal.4th at p. 1172.) For example, “‘reliance on Evidence Code section 352 to exclude evidence of marginal impeachment value that would entail the undue consumption of time generally does not contravene a defendant’s constitutional rights to confrontation and cross-examination.’ [Citations.]” (*Pearson, supra*, 56 Cal.4th at p. 455.)

Relying on Evidence Code section 352, the trial court precluded defense counsel from exploring whether Sergio had an incentive to lie or exaggerate about the charged offenses to obtain a U-Visa. We conclude the trial court erred in restricting defense counsel’s cross-examination of Sergio because his eligibility for a U-Visa resulted from his having been a victim of the charged offenses. His desire to obtain a U-Visa was relevant to show motive and/or bias and was relevant to his credibility.

While there appears to be no California cases on point, we found several well-reasoned, out-of-state cases that have concluded a U-Visa request is proper impeachment material. In *State v. Del Real-Galvez* (Or.Ct.App. 2015) 346 P.3d 1289, 1293 (*Del Real-Galvez*), our Oregon counterpart court found reversible error in a trial court’s refusal to allow questioning about the U-Visa where there was a sufficient factual

foundation. In that case, defendant presented evidence the victim's mother applied for a U-Visa on the grounds of her daughter's alleged abuse by defendant, and that the daughter/victim was aware of her mother's immigration status and that alleging sexual abuse would help her mother obtain the U-Visa. (*Ibid.*)

Relying on the reasoning of a prior decision, *State v. Valle* (Or.Ct.App. 2013) 298 P.3d 1237 (*Valle*), the Oregon appellate court rejected the prosecutor's argument the proffered evidence was inadmissible because there was no evidence the victim knew or believed her mother would actually submit a U-Visa application. (*Del Real-Galvez, supra*, 346 P.3d at p. 1293.) It adopted the following analysis: “[A]ll defendant had to do to lay a sufficient foundation was show that the evidence was relevant, and, to do that, all he had to show was that the evidence had a tendency, however slight, to demonstrate that [the victim] had a personal interest in testifying against him. He did that. He presented information, in the form of [the victim's own testimony, that [she] had applied for a [U-Visa] on the ground that she was a victim of abuse. From that testimony alone, a jury could infer that [she] had a personal interest in testifying that she had been abused. Simply put, [the victim] had applied for an opportunity to stay in the country on the ground that she had been abused; based on that fact, a jury could reasonably infer that she had a personal interest in testifying in a manner consistent with her application for that opportunity.” (*Ibid.*)

The court in *Del Real-Galvez* decided defendant was not required to show the victim knew or believed her mother would submit a U-Visa application, rather all he had to do was to lay a sufficient foundation to show the evidence was relevant. (*Del Real-Galvez, supra*, 346 P.3d at p. 1293.) Defendant satisfied the requirement by submitting evidence the victim's mother applied for the U-Visa on the ground her daughter had been sexually abused, the victim knew about her mother's immigration status, and she understood the sexual abuse allegation would help her mother obtain a U-

Visa. (*Ibid.*) The court concluded defendant's impeachment evidence was relevant and should not have been excluded. (*Ibid.*)

In the *Valle and Del Real-Galvez* opinions, the Oregon appellate courts determined the error was not harmless. (*Del Real-Galvez, supra*, 346 P.3d at pp. 1293-1294; *Valle, supra*, 298 P.3d at p. 1244.) In those cases the victim's "credibility was central to the state's case." (*Del Real-Galvez, supra*, 346 P.3d at p. 1294; *Valle, supra*, 298 P.3d at p. 1244 [victim's credibility "was essential"].) And in *Del Real-Galvez*, the prosecutor presented argument to the jury that the victim had "no motive to fabricate a disclosure against [defendant.]" (*Del Real-Galvez, supra*, 346 P.3d at p. 1294.)

The Kentucky appellate court in *Romero-Perez v. Commonwealth* (Ky.Ct.App. 2016) 492 S.W.3d 902, 906 (*Romero-Perez*), reached the same conclusion, holding evidence of a U-Visa request was admissible impeachment material. "One can readily see how the U-Visa program's requirement of 'helpfulness' and 'assistance' by the victim to the prosecution could create an incentive to victims hoping to have their U-Visa's granted. Even if the victim did not outright fabricate the allegations against the defendant, the structure of the program could cause a victim to embellish her testimony in the hopes of being as 'helpful' as possible to the prosecution. [Citation.]" (*Ibid.*, citing Michael Kagan, *Immigrant Victims, Immigrant Accusers* (2015) 48 U. Mich. J.L. Reform 915, 945 [U-Visa "gives witnesses a potentially powerful motive to make false or exaggerated reports"].)

The *Romero-Perez* court presented well-reasoned analysis of the probative versus prejudicial value of the U-Visa. "While some prejudice might result from allowing examination into the U-Visa application, we believe a criminal defendant's constitutional right to confront his accuser must prevail in this instance. [The victim] had applied for a U-Visa, which the trial court was waiting to certify until after trial. Certainly, it would have been entirely reasonable for [the victim] to assume that the fate of her U-Visa rested on the testimony she gave at trial. Given the importance that

obtaining legal status and the right to remain in the United States, perhaps indefinitely, carries with it, [the victim] certainly had a motive to provide ‘helpful’ testimony to the prosecution.” (*Romero-Perez, supra*, 492 S.W.3d at pp. 906-907, citing *State v. Perez-Aguilera* (Kan.Ct.App. 2015) 345 P.3d 295; *Valle, supra*, 298 P.3d at p. 1240.)

The *Romero-Perez* court concluded that clearly “there was a ‘practical connection between the evidence sought to be introduced and the alleged implication of bias.’ [Citation.]” (*Romero-Perez, supra*, 492 S.W.3d at p. 907.) The victim’s ability to successfully obtain the U-Visa “was dependent on her being a victim of domestic violence,” and therefore, her application for the visa was “relevant evidence from which the jury could infer [the victim] had a personal interest in the outcome of the case.” (*Ibid.*)

In *Romero-Perez*, the court recognized it was possible that the victim’s immigration status “could trigger negative sentiments in the minds of some jurors[,]” but nevertheless, “any prejudice that might result from the jury knowing the victim’s immigration status must be weighed against [defendant’s] right to effective cross-examination.” (*Romero-Perez, supra*, 492 S.W.3d at p. 907.) The court noted that if the victim obtained and held the visa for three years, she could seek “permanent resident status” and “[t]he value of such status for those living in immigration limbo cannot be overstated. The ability to transform oneself from illegal immigrant, to legal visa holder, to permanent legal resident in a relatively short amount of time without ever having to leave the United States, *could* provide a strong motive for fabrication or embellishment.” (*Ibid.*) Accordingly, defendant’s right to “effectively probe into a matter directly bearing on witness credibility and bias must trump any prejudice that would result from the jury’s knowledge of the victim’s immigration status.” (*Ibid.*) The court held it was harmless error to exclude evidence of the victim’s pending U-Visa application because her version of events was corroborated by two other witnesses and

physical evidence. (*Id.* at pp. 907-908.) Given the overwhelming evidence of guilt, the court deemed the error harmless beyond a reasonable doubt. (*Id.* at p. 908.)

Other states have adopted the reasoning of the Kentucky and Oregon decisions. (See e.g., *State v. Perez* (S.C. 2018) 816 S.E.2d 550, 555 [excluding evidence two mothers of molestation victims applied for U-Visas not harmless error due to lack of physical evidence and one mother’s conflicting testimony].) In addition, federal case law imposes a duty on prosecutors to disclose to the defense evidence of a witness’s favorable immigration benefits as exculpatory and impeachment information as required by *Brady/Giglio*.³ (*United States v. Blanco* (9th Cir. 2004) 392 F.3d 382, 392 [government did not disclose witness received special immigration treatment from Immigration and Naturalization Service for work with Drug Enforcement Administration].)

Turning to the instant case, we can reasonably infer the prosecutor turned over evidence before trial of Sergio’s interest in a U-Visa because she recognized this was relevant impeachment evidence, i.e., exculpatory evidence within the meaning of *Brady*. On the first day of trial, the prosecutor, anticipating defense counsel would want to cross-examine Sergio on the matter, asked for clarification. Despite defense counsel’s request for an Evidence Code section 402 hearing, and her willingness to abide by preset parameters on her cross-examination, the court deferred ruling on the issue until after it heard Sergio testify. Thereafter, the court did not hold an Evidence Code section 402 hearing, despite defense counsel’s renewed motion to cross-examine Sergio about his U-Visa. After hearing Sergio’s inconsistent testimony and his statements that conflicted with the police officers’ testimony, defense counsel asserted that it was arguable Sergio was testifying “with an ulterior motive.” The court determined that under Evidence Code section 352 there was ample other impeachment testimony and the proposed evidence would be an undue consumption of time.

³ *Giglio v. United States* (1972) 405 U.S. 150, and *Brady v. Maryland* (1963) 373 U.S. 83 (*Brady*).

We conclude the court abused its discretion under Evidence Code section 352 in prohibiting cross-examination of Sergio regarding his U-Visa interests. The ruling prevented Hernandez from establishing a full picture of the alleged victim's potential biases. There were no other witnesses to the incident, and the case rested solely on a credibility determination. The physical evidence was inconclusive. Officers testified there was nothing to support Sergio's claim Hernandez hit him in the face with a full can of beer that drenched the inside of the car. Contrary to Sergio's claim he found the can/weapon in his beer-drenched car, the officers did not find the alleged weapon and their investigation revealed the car's interior was dry. Moreover, Sergio's credibility was questionable given the evidence he may have been drinking that day. He called the police, but then drove away. He gave the police an inaccurate description of his assailant despite the fact Sergio knew Hernandez's name and where his friend could typically be found.

Moreover, the record shows Sergio's story about the incident evolved over time to become extra violent and more gang-related. He did not initially tell the officers the two men exchanged aggressive verbal challenges before the assault or that Hernandez used his fists in addition to the beer can. It was reasonable to infer Sergio may have exaggerated or lied about what transpired, motivated by his desire to obtain a U-Visa. It cannot go unnoticed that in 2017 our nation's political climate had placed a growing emphasis on immigration status. Due to the heightened and unrelenting risk of deportation, the value of a U-Visa to an undocumented immigrant and his family in the United States cannot be overstated. The U-Visa application could have been Sergio's motivation for exaggerating or falsifying the assault. The court abused its discretion in deciding the information would have minimal probative value, especially since the court refused to hold an Evidence Code section 402 hearing to learn more information about the circumstances surrounding Sergio's U-Visa application and it was unwilling to give defense counsel an opportunity to tailor her questions to address the court's concerns.

This was a case built on circumstantial evidence and testimony from only one witness having suspect credibility. The court's ruling impermissibly prevented a full picture of potential bias and this error cannot be deemed harmless under either of the standards applied for assessing error, i.e., the *Chapman* test (harmless beyond a reasonable doubt) and the *Watson* test (a reasonable probability the error was harmless). (*Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Watson* (1956) 46 Cal.2d 818, 836,)

DISPOSITION

The judgment is reversed.

O'LEARY, P. J.

WE CONCUR:

MOORE, J.

GOETHALS, J.